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Supreme Court, U.S.
FILED

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In the Supreme Court of the United States

RICHARD SCHALLER,
Petitioner,

v.

THE UNITED STATES OF AMERICA,
Respondent,

On Petition for Writ of Certiorari
To the United States Court of Appeals
For the Eleventh Circuit

Petition for Writ of Certiorari

RICHARD SCHALLER
Pro Se
101 Dana Pointe
Niceville FL 32578
850 897 3324

QUESTION

Did the district court exceed its discretion by denying defendant Richard Schaller *all* subpoenas and thereby a compulsory process as guaranteed to defendant Schaller by the US Constitution Sixth Amendment?

LIST OF PARTIES

The Honorable Lacey A. Collier, US District Judge

The Honorable Susan H. Black, US Circuit Judge

The Honorable Beverly B. Martin, US Circuit Judge

The Honorable R. Lanier Anderson, US Circuit Judge

Robert Davies, Esq., US Appellate Counsel

Stephen P. Preisser, Esq., US Trial Counsel

Ryan T. Truskoski, Esq., Petitioner's Appellate Counsel

Albert Francis Oram, Jr., Esq., Petitioner's Trial Counsel

Richard Schaller, Petitioner

There are no corporate, non-governmental entities interested in this case.

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CITATIONS OF THE OFFICIAL & UNOFFICIAL REPORTS

In the United States Court for the Northern District of Florida, Pensacola Division, UNITED STATES of America, Plaintiff, v. Richard SCHALLER, Defendant, Case No. 3:08cr75/LAC

- May 29, 2009, Motion Hearings Before the Honorable Lacey A. Collier Senior United States District Judge
- July 17, 2009, The Transcript of Sealed Ex Parte Hearing Before the Honorable Lacey A. Collier Senior United States District Judge
- July 27-31, 2009, Official Trial Record
- October 13, 2009, Sentencing Hearing of Richard Schaller

In the United States Court of Appeals for the Eleventh Circuit, UNITED STATES of America, Plaintiff-Appellee, v. Richard SCHALLER, Defendant-Appellant., Case No. 09-15394

- October 21, 2010, Appeal from the United States District Court for the Northern District of Florida, C.A. 11 (Fla.)
- December 14, 2010 On Petition(s) for Rehearing and Petition(s) for Rehearing En Banc

JURISDICTION

The statutory provision which confers jurisdiction upon this court is 28 U.S.C. § 1254, Courts of Appeals; certiorari; certified questions.

On July 17, 2009 at the ex parte hearing on subpoenas for defense witnesses the court denied *all* requested subpoenas. On July 31, 2009 the U.S. Court for the Northern District of Florida, Pensacola Division (e.g., court of first instance) convicted Schaller. On April 29, 2010 Schaller filed his appeal in the U.S. Court of Appeals for the 11th Circuit Court. On October 21, 2010 the 11th Circuit Court denied the Schaller appeal and Schaller filed for appellate court review en banc. On December 14, 2010 the 11th Circuit Court denied Schaller's petition for en banc review. Schaller now submits this timely petition based upon the appellate court denial for en banc review.

CONSTITUTIONAL PROVISION, STATUTE, AND REGULATIONS AT ISSUE

United States Constitution Sixth Amendment, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

Federal Rules of Criminal Procedure, Rule 17(b)

STATEMENT OF THE CASE

Schaller motioned the court for multiple defense witness subpoenas. At the July 17, 2009 ex parte hearing regarding defense witness subpoenas the court denied *all* subpoenas stating the facts of the case did not justify issuing subpoenas. Schaller went to trial without defense witness subpoenas. During trial Schaller repeated his request for defense witness subpoenas which the court denied in each instance. After a five-day jury trial, Schaller was convicted of one count of obstruction of justice (18 U.S.C. 1512(c)), one count of a false declaration before a grand jury (18 U.S.C. 1623), one count false statement (18 U.S.C. 1001), and twenty-nine counts of aiding and abetting a conflict of interest (18 U.S.C. 208). Schaller appealed his conviction which was denied.

REASON WHY CERTIORARI SHOULD BE GRANTED

Despite multiple Supreme Court decisions upholding each defendant's US Constitution Sixth Amendment right to a compulsory process, lower courts continue to exercise discretion at both the district and appellate level imposing their own interpretations of what constitutes compulsory process and applying their interpretations contrary to Supreme Court rulings and the US Constitution. In the instant case, United States of America v. Richard Schaller, 3:09cr75/LAC, the US Court for the Northern District of Florida, Pensacola Division, denied *all* subpoenas for defense witnesses requested by

Schaller. Significantly, thirty-eight of the forty subpoenas requested by Schaller were for current or former US government employees involved in the Schaller case and without the court-ordered sanction of a subpoena no employee of the United States of America, past or present, can be expected to testify in behalf of defendant Schaller against their employer, the United States of America. Schaller was convicted and appealed his conviction to the 11th Circuit Court of Appeals in case 09-15394. The Appellate court denied the appeal supporting district court discretion to deny *all* subpoenas agreeing with the district court that Schaller had not justified his proposed witnesses and also citing the court's discretion in Federal Rule of Criminal Procedure Rule 17b. We concede that it may be reasonable for the court to excuse some witnesses based upon an evaluation of individual circumstances, but strongly assert the court does not have discretion to blanket deny *all* subpoenas by rationalizing that none are relevant to the defense of the accused. Denying any citizen *all* subpoenas denies the right to a compulsory process. Despite the many Supreme Court decisions confirming a defendant's US Constitution Sixth Amendment right to a compulsory process, this fundamental right is still treated by lower courts as a discretionary issue showing little or no regard for its Constitutional foundation. Allowing lower court discretion on a foundational right in the US Constitution not only defeats that single right, but invites chaos in the judicial system and our Nation. A compulsory process is not a trivial or transient matter, but, instead, fundamental to due process and justice.

The Schaller case demonstrates the US Constitutional Sixth Amendment right to a compulsory process is not settled law and requires renewed attention by the highest court by hearing and ruling on the 11th Circuit Court decision to deny the Schaller appeal.

The Schaller case is unique in that his proposed defense witnesses were the government employees who recruited and contracted Schaller to develop classified capabilities for the United States Air Force in the war on terror. Schaller needed these witnesses to testify to their responsibility in ordering the closed relationship between Schaller and his government program manager necessary to accomplish the unique and highly classified work Schaller was contracted by the government to perform. The proposed defense witnesses could have exonerated Schaller by describing their own responsibility in his activities and achieved credibility with the jury by describing Schaller's unique role and success in behalf of our war on terror. These government officials could have testified the relationship between Schaller and his government program manager was in the government interest and not a conflict. These same officials could have testified to the ambiguity of the obstruction, false declaration, and false statement allegations against Schaller and that none were ever material to the government's interest. These government employees solicited Schaller for his experience in covert operations and adopted his many proposals for developing some of our Nation's most effective capabilities against terrorists.

However, these government officials were reluctant to testify to their own responsibility and speak out for Schaller against their employer, the United States of America. Without subpoenas Schaller could not compel their participation in his behalf, present critical evidence, expand testimony beyond the limits set by the direct examination of prosecution witnesses, create reasonable doubt as to the prosecution's theory of the case, tell his side of the story, and achieve credibility with the jury,.

Further, the United States Supreme Court has repeatedly and consistently recognized a defendant's right to both present a complete defense and to present witnesses as part of that defense. See e.g., *Taylor v. Illinois*, 484 U.S. 400, 408, 108 S. Ct. 646, 98 L.Ed.2d 798 (1988); *Crane v. Kentucky*, 476 U.S. 683, 687, 690, 106 S. Ct. 2142, 90 L.Ed.2d 636 (1986); *California v. Trombetta*, 467 U.S. 479, 485, 104 S. Ct. 2528, 81 L.Ed.2d 413 (1984); *Washington v. Texas*, 388 U.S. 14, 19, 87 S. Ct. 1920, 18 L.Ed.2d 1019 (1967).

The Sixth Amendment source of these rights is the Compulsory Process Clause, which embraces the right to have the witness' testimony heard by the trier of fact. As the United States Supreme Court has stated:

> The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may

> decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process law. *Washington v. Texas*, 388 U.S. 14, 19, 87 S. Ct. 1920, 18 L.Ed.2d 1019 (1967).

Simply put, defendants deserve to have jurors understand their defense before they render their verdict so that the jury decision is reliable and is one the public has confidence relying on. The verdict rendered in the Schaller case was not reliable because Schaller's right to a compulsory process was infringed upon and he was deprived of a fair trial as a result.

The district court justified denying *all* Schaller subpoenas by stating that none were relevant to the facts of the case and the requested subpoenas only applied to some and not all the allegations against Schaller. Both arguments are insufficient to justify denying Schaller a compulsory process. First, the district court accepted the indictment against Schaller as the facts of the case. The indictment is only the prosecution's theory of the case and not fact until proven beyond a reasonable doubt before a jury. Allowing any court to deny a defendant compulsory process because that defendant has been accused of a crime effectively nullifies that constitutional right. Second, it is not reasonable or

rational to expect each witness to be relevant to each count in a multiple-count indictment. Allowing the district court to rationalize away a constitutional right by accepting accusations as facts without due process and applying unreasonable criteria such as requiring each witness to testify to each count in an indictment allows the court unlimited discretion to defeat any defendant's constitutional rights.

The appellate court denied Schaller's appeal by agreeing with the district court that the proposed witnesses were not relevant to the allegations against Schaller and the court had discretion under Federal Rules of Criminal Procedure Rule 17(b). The appellate court, like the district court, is not in a position to speculate a priori how any proposed witness would testify or affect a jury. Rule 17b supports the constitutional requirement to issue subpoenas and provides courts discretion over funding defense witness participation. Rule 17(b) does not, however, provide the court discretion over issuing subpoenas. Schaller asked the court for subpoenas and not funding witness participation. The requested subpoenas were for government employees already funded by the government. Schaller did not need nor ask the court to fund witness participation. The court denied subpoenas and not funding for witness participation. The basis for Schaller's appeal was denial of a compulsory process and not discretionary funding as stated in the appellate court's decision.

CONCLUSION

Grant certiorari.

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APPENDIX
IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 09-15394
Non-Argument Calendar

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
OCTOBER 21, 2010
JOHN LEY
CLERK

D.C. Docket No. 08-00075-CR-3-LAC

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

RICHARD SCHALLER,

Defendant-Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA

(October 21, 2010)

Before BLACK, MARTIN, and ANDERSON, Circuit Judges.

PER CURIAM:

Richard Schaller appeals his convictions for altering, destroying, mutilating, and concealing a corporate record with the intent to impair the record's integrity and availability for use in an official proceeding, in violation of 18 U.S.C. § 1512(c); making a false declaration before a grand jury, in violation of 18 U.S.C. § 1623; making a false statement, in violation of 18 U.S.C. § 1001; and twenty-nine counts of aiding and abetting a codefendant, who participated as a government employee in a contract in which the codefendant had a financial interest, in violation of 18 U.S.C. §§ 208, 216(a)(2), and 2. These charges arose from Schaller's involvement in concealing the fact that his codefendant Mark O'Hair, who was a former project manager for the Air Force Research Lab ("AFRL") at Eglin Air Force Base, was also a director of Schaller's company, Schaller Engineering, Inc. ("SEI"), which received Air Force contracts.

I. Schaller argues that the district court abused its discretion by denying his request to subpoena six Air Force officials under Federal Rule of Criminal Procedure 17(b). We review the denial of a Rule 17(b) motion for abuse of discretion. *United States v. Rinchack*, 820 F.2d 1557, 1566 (11th Cir.1987). A defendant making a Rule 17(b) motion bears the burden of articulating specific facts that show that a requested witness's testimony is relevant and necessary. *Id.* "[O]nce the defendant asserts facts which, if true, would be relevant to any issue, the motion for a subpoena must be granted unless the

assertions are facially incredible or unless the government can show that they are untrue or that the request is frivolous." *United States v. Hegwood*, 562 F.2d 946, 953 (5th Cir.1977).[1] If the defendant adequately asserts relevant facts, then "the burden of showing lack of truth, frivolousness or abuse of process falls on the government." *Id.*

Schaller argues that the testimony of the six Air Force officials would have been relevant to his defense that the government waived O'Hair's conflict of interest. Section 208 of Title 18 of the United States Code provides that

> whoever, being an officer or employee of the executive branch of the United States Government, ... participates personally and substantially as a Government officer or employee ... in a ... contract ... or other particular matter in which, to his knowledge, he ... [or an] organization in which he is serving as ... director ... has a financial interest [shall be guilty of a felony]

18 U.S.C. § 208(a). Subsection (a) does not apply if

> the officer or employee first advises the Government official responsible for appointment to his or her position of the nature and circumstances of the ... contract ... or other particular matter and makes full disclosure of the financial interest and receives in advance a

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[1]In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir.1981) (en banc), we adopted as binding precedent all decisions of the former Fifth Circuit handed down before October 1, 1981.

> written determination made by such official that the interest is not so substantial as to be deemed likely to affect the integrity of the services which the Government may expect from such officer or employee.

Id. § 208(b)(1).

Schaller tells us that, if subpoenaed, at least some of the Air Force officials would have testified that they knew about O'Hair's conflict of interest, and all of them would have testified to the existence of an Air Force acquisition plan that fostered conflicts of interest in violation of Air Force policy. But even if this is true, the witnesses' testimony would not have been relevant to Schaller's waiver defense. Schaller never indicated to the district court that any of the six witnesses would testify that O'Hair disclosed his position as an SEI director, or that he sought and received a written opinion waiving the conflict. *See Id.* (providing that a conflict of interest may be waived only if the government employee makes a full disclosure and obtains a written opinion stating that the conflict is waived); see also *United States v. Hedges*, 912 F.2d 1397, 1401 (11th Cir.1990) (noting that the provisions of 18 U.S.C. § 208(a) may be waived if the government employee makes a full disclosure and obtains a written opinion).

Schaller also argues that the witnesses' testimony about the existence of the acquisition plan would show that he lacked the mens rea necessary to be convicted of aiding and abetting O'Hair's personal and substantial participation in contracts in which O'Hair had a financial interest. But this argument

fails because what other people know about the acquisition plan has no bearing on Schaller's own personal knowledge and intent. For these reasons, the district court did not abuse its discretion in denying his Rule 17(b) motion.

II. Schaller next argues that the district court erred in declining to instruct the jury on Federal Acquisition Regulation ("FAR") 9.504, insofar as the regulation was relevant to his defense theory that the Air Force waived any conflict of interest.[2] "We review a district court's refusal to give a particular jury instruction for abuse of discretion." *Beckford v. Dep't of Corr.*, 605 F.3d 951, 957 (11th Cir.2010)

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[2] FAR 9.504 reads, in relevant part:

(a) Using the general rules, procedures, and examples in this subpart, contracting officers shall analyze planned acquisitions in order to—

(1) Identify and evaluate potential organizational conflicts of interest as early in the acquisition process as possible: and

(2) Avoid, neutralize, or mitigate significant potential conflicts before contract award

(e) The contracting officer shall award the contract to the apparent successful offeror unless a conflict of interest is determined to exist that cannot be avoided or mitigated. Before determining to withhold award based on conflict of interest considerations, the contracting officer shall notify the contractor, provide the reasons therefor, and allow the contractor a reasonable opportunity to respond. If the contracting officer finds that it is in the best interest of the United States to award the contract notwithstanding a conflict of interest, a request for waiver shall be submitted in accordance with 9.503. The waiver request and decision shall be included in the contract file.

(internal quotation marks omitted).[3]

"A criminal defendant has the right to have the jury instructed on [his] theory of defense, separate and apart from instructions given on the elements of the charged offense." *United States v. Ruiz*, 59 F.3d 1151, 1154 (11th Cir.1995). "A trial court may not refuse to charge the jury on a specific defense theory where the proposed instruction presents a valid defense and where there has been some evidence adduced at trial relevant to that defense." *Id.* A district court's refusal to give a requested jury instruction constitutes reversible error only if the requested instruction "(1) is correct; (2) is not substantially covered by other instructions which were delivered; and (3) deals with some point in the trial so important that the failure to give this instruction seriously impairs the defendant's ability to defend himself." *United States v. Williams*, 728 F.2d 1402, 1404 (11th Cir.1984).

Schaller has failed to show that the requested instruction addressed a point so important that the failure to give the instruction seriously impaired his ability to defend himself. *See Id.* Any reading of FAR 9.504 cannot change the fact that FAR 9.503 provides that a conflict of interest waiver request

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[3] Schaller argues that this abuse of discretion standard is unconstitutional, and he urges us to review *de novo* the district court's failure to give his proposed instruction. In doing so, he asks us to ignore our precedent setting this standard. Under the prior precedent rule, this Court is "'bound to follow a prior binding precedent unless and until it is overruled by this court en banc or by the Supreme Court.'" *United States v. Martinez*, 606 F.3d 1303, 1305 (11th Cir. 2010) (quoting *United States v. Vega-Castillo*, 540 F.3d 1235, 1236 (11th Cir. 2008)).

"must be in writing, shall set forth the extent of the conflict, and requires approval by the agency head or a designee." 48 C.F.R. § 9.503. Schaller acknowledges that "the waiver of conflict was never done in writing." With these facts, Schaller could not produce the evidence necessary for the jury to conclude that the waiver requirements set forth in 18 U.S.C. § 208(b) or FAR 9.504 and 9.503 had been satisfied. He was therefore not entitled to a jury instruction referencing FAR 9.504 for the purposes of his waiver defense, because this would not have been a "valid defense." See *Ruiz*, 59 F.3d at 1154 (emphasis added). Schaller also appears to argue again here, as he did before the district court, that the instruction was relevant to whether Schaller had the mens rea necessary to be convicted of aiding and abetting O'Hair's conflict of interest. Under this theory, however, the instruction would have failed the second prong of the *Williams* test. As the district court explained, the issue of intent was adequately covered by the instructions given on the elements of the offense. See *Williams*, 728 F.2d at 1404.

For each of these reasons, Schaller's convictions are **AFFIRMED**.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

FILED
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ELEVENTH CIRCUIT
DEC 14 2010
JOHN LEY
CLERK

No. 09-15394

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

RICHARD SCHALLER,

Defendant-Appellant

On Appeal from the United States District Court
For the Northern District of Florida

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

Before: BLACK, MARTIN, and ANDERSON, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

Boyce F. Martin

UNITED STATES CIRCUIT JUDGE